C.P.F. Corporation *and* Service Employees International Union, Local 525, AFL–CIO. Case 5–CA–20875

June 10, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 2, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, C.P.F. Corporation, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d).

''(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees concerning union activity.

WE WILL NOT promise benefits to employees to influence them against supporting a union.

WE WILL NOT discourage union membership by discharging or in any other manner discriminating against our employees with respect to their wages, hours, or other terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Hector Martinez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him with interest.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful termination of Hector Martinez, notifying him that the action has been taken, and that the termination will not be used against him in the future.

C.P.F. CORPORATION

Mark F. Wilson Esq. and *Charles Posner, Esq.*, for the General Counsel.
Enrique Balseiro, Esq., of Washington, D.C., for the Respondent.
Jay Hessey, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Washington, D.C., on June 18 and 19 and July 5 and 6, 1990, on an unfair labor practice charge filed on December 22, 1990, and a complaint issued on February 26, 1990, alleging that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees concerning union activity, by creating the impression that union activities were subject to surveillance, and by promising benefits to induce employees to refrain from union activity. The complaint further alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Rosa Lowry and Hector Martinez because of their union activity. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record, including my opportunity directly to observe the witnesses while testifying and their demeanor,

and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Maryland corporation, from, its place of business in Washington, D.C., has been engaged in the business of providing janitorial services to various institutions, including the District of Columbia Superior Courthouse, located in Washington, D.C., the sole facility involved in this proceeding. In the course of those operations, the Respondent, during the 12 months prior to issuance of the complaint, a representative period, received gross revenues exceeding $50,000 from services provided to District of Columbia Government. The complaint alleges, the answer admits, and find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer, as amended, admits and I find that the Service Employees International Union, Local 525 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This proceeding involves an initial organization campaign waged among Respondent's 55 to 60 janitorial workers employed under a cleaning contract at the Superior Court Building in Washington, D.C. From the standpoint of remedy, the most dramatic issue stems from the alleged discharges of Rosa Lowry and Hector Martinez.

By way of background, Hector Martinez, on November 18, 1989,[1] made the initial contact with the Union. Pursuant thereto, on Monday, November 27, union representatives met Martinez and other employees, including Rosa Lowry, as they were leaving work.[2] On that occasion, questions were answered, authorization cards were solicited and signed, and union literature distributed.

Later that week, on Friday, December 1, Rosa Lowry was terminated.

On December 18, employees were assembled twice in connection with the issue of representation. First, before the 6 p.m. work shift began, Union Representative Jay Hessey, in company of 20 to 25 employees, including Martinez, went to the Respondent's courthouse office, and hand-delivered a written demand for recognition to Lilly Gatlin, the Respondent's project manager at that site.[3] Later, at 7:30 p.m., the Respondent assembled employees for the purpose of presenting its position on unionization. Toward the end of that session, Martinez and Lucy O'Brien, the Respondent's administrator, became embroiled in a verbal exchange which resulted in the former's termination. The General Counsel contends that Martinez was discharged, while the Respondent argues that he voluntarily quit.

The complaint, in addition to the discrimination issues, includes independent 8(a)(1) allegations, all of which, in the first instance, turn on issues of credibility. However, because they relate directly to the question of when the Respondent's officials learned of union activity and other matters requisite to analysis of the 8(a)(3) issues, all are discussed below in conjunction with the alleged unlawful discharges.

B. *The Alleged Discrimination*

1. Rosa Lowry

Lowry was hired on December 4, 1988. She was terminated on Friday, December 1. During her entire employment, Lowry worked as a cleaner, assigned to the third floor. Her immediate supervisor was Mary Wonson. The latter reported to Lilly Gatlin, the highest ranking member of management with immediate day-to-day responsibility at the courthouse.

The Respondent counters the General Counsel's discrimination claim with evidence that it was prompted solely by Lowry's ''[i]nsubordination [and] . . . bad performance.'' This contention is enhanced by the evidence showing that Lowry's union activity was limited, if in fact known by the Respondent, at times relevant to her discharge. In this respect, Jay Hessey, the Union's provisional president, did testify that Lowry and Martinez were the ''main . . . employee leaders.'' However, I am not convinced that this was true of Lowry during her employment. While her involvement might have intensified after the discharge,[4] the record does not specify conduct on her part that would warrant any conclusion that, earlier, she offered affirmative support to organization beyond personal execution of an authorization card.

Nevertheless, the General Counsel points to the element of timing. Lowry was terminated on Friday, December 1. The General Counsel stresses that this was the final day of the work week after Lowry was observed by a management representative in the presence of union officials. In this regard, uncontradicted testimony establishes that on Monday, November 27, union representatives met with Respondent's employees outside the courthouse after their shift ended at 10 p.m.[5] Lowry, with corroboration from Hessey and Hector Martinez, testified that she was among 10 employees present on that occasion. An illiterate in both English and Spanish, she avers that she on that evening signed a union authorization card (G.C. Exh. 2), after it was explained by Martinez,

[1] All dates refer to 1989.

[2] The normal work shift is from 6 p.m. to 10 p.m.

[3] Hessey, the next day, also hand-delivered a demand letter to the Respondent's headquarters. On December 22, the Respondent filed an election petition in Case 5–RM–951, reflecting a demand for recognition had been received from the Union on December 19. G.C. Exh. 5.

[4] Hessey testified that Lowry attended meetings held after work and on Saturdays. However, there is no showing that any such meetings preceded her discharge.

[5] While I am convinced that this informal gathering provided the union representative its first opportunity for face-to-face contact with Respondent's employees, this finding is complicated by Hessey's prehearing affidavit. Until confronted therewith, when called by the Respondent as an adverse witness, the November 27 meeting was described by Hessey and others as the first direct, personal confrontation between Respondent's employees and union representatives. In contrast, however, Hessey's affidavit states that in mid-November, before any cards were signed, a meeting was held at the Union's offices attended by nine of Respondent's employees. Hessey did not attempt to repudiate the affidavit as mistaken, but simply testified that he had forgotten this meeting. Neither Martinez nor Lowry testified that they had attended such a meeting. I doubt that it was and shall dismiss the affidavit, as well as certain uncorroborated testimony of Hessey, as a product of confusion, rather than recollection from actual experience.

with other information inscribed by a now-discharged coworker, Garr.

Lowry, Martinez, and Hessey testified that Proect Supervisor Gatlin emerged from the courthouse as this gathering was in progress. Lowry testified that Gatlin headed toward herself and Hessey, inquiring as to what was happening. Hessey allegedly replied, ''people were joining the union.'' The General Counsel's witnesses uniformly relate that Gatlin requested and was given a sample of the union's literature,[6] and then left the premises.

The Respondent contends that, if there was such a meeting, no management representative attended or was aware of it. Gatlin asserts that she first learned that the Union was attempting to organize the Respondent's courthouse employees on December 18, almost 3 weeks after the Lowry discharge.[7] She testified that, though she used the front entrance regularly, she never observed any group assembled outside in that area and could recall no one ever identifying himself as a ''union person.'' She further denies that she at times material ever requested or obtained union literature. This denial raises a threshold issue of credibility, for, if true, there would be no basis for finding, or inferring, that Respondent knew or had reason to believe, that Lowry was prounion.[8] Nonetheless, essentially because of my confidence in the testimony of Martinez, it is concluded that the evidence that Gatlin walked in on the Union's November 27 confrontation with employees was not manufactured. Her denial is rejected.[9]

On the foregoing, it is found that Gatlin at that time learned that organization was in progress while observing Martinez and Lowry, among others, in the presence of union representatives. However, although Hessey suggests otherwise, there is no basis for inferring that Gatlin would have assumed that Lowry was a ring-leader or deeply involved. Thus, Hessey asserts that when Gatlin approached four or five employees were present, including Lowry, who was standing right next to him, ''signing the card.'' His testimony seemed a bit too pat. It is not confirmed by Lowry, who states that she was among 10 people standing in a group with Hessey. According to Lowry, Martinez, who had assisted her in completing her card, was assisting a group of coworkers to sign cards, about 10 feet distant from Lowry. She does not testify that she was involved with the card at that time, and since Hessey does not speak Spanish, there would have been no reason for her to be completing a card in his immediate presence. Consistent with this analysis, Martinez testified that Gatlin appeared as the cards were being returned to the union representatives. In the face of this kaleidoscope of testimony, I am unwilling to infer that Gatlin was in a position to observe that Lowry possessed a union authorization card.

Concerning the assigned reason for the termination, O'Brien described Lowry as a lousy employee, whose record speaks for itself. Gatlin offered that she was a poor worker, who did not follow orders, obey them, or properly do her work. Gatlin adds that when she attempted to correct or instruct Lowry, she would become talkative and abusive, and threaten to call her attorney to report that Gatlin was unfairly giving her too much work.

Prior to discharge, Lowry suffered a well-defined history of discipline. Her specific problems began 2 months after her hire. Thus, in January, she called the office to complain that Gatlin had changed her schedule, giving her too much work in the form of ''somebody else's job.'' She was given the reprimand as a reminder that Gatlin and her immediate supervisor, Mary Wonson, had authority to change work schedules as they pleased. (R. Exh. 4(a).) Gatlin credibly testified that Lowry reacted by accusing Gatlin of discriminating against her. Lowry declined to acknowledge the discipline, and refused a copy when proffered by Gatlin.

The next incident was triggered by a tenant complaint, dated August 31, 1989, concerning the failure to dust and vacuum a particular office in Lowry's assigned area. (R. Exh. 4(b).) In addition, an inspection report was offered, dated August 31, which reflected derelictions in a number areas, including that of Lowry. (R. Exh. 4(c).) In consequence, Lucy O'Brien, on September 1, performed a personal inspection at the courthouse, finding that Lowry's area was dusty. She therefore instructed Gatlin to discipline Lowry. A written warning, carrying that same date, was issued to Lowry for unsatisfactory work. (R. Exh. 4(d).) Once more, on request, Lowry declined to acknowledge or accept a copy. According to Gatlin, Lowry argued that Gatlin was treating her in an unfair, discriminatory fashion. Lowry afforded no testimony as to this citation.

Lowry's next infraction resulted in a suspension. On November 17, an inspection reported cited discrepancies on the third, fourth, and fifth floors, including the cell block area for which Lowry was responsible. (R. Exh. 4(e).) At. Lucy O'Brien's direction, Gatlin discussed the offenses with all

[6] Martinez testified that Gatlin was given a copy of G.C. Exh. 3(a), the Spanish version of the Union's organizational literature. Hessey states that she was given the English version. G.C. Exh. 3(h) The variance was taken as insignificant and of no aid to resolution of the issue of credibility arising from Gatlin's denial that she was present on that occasion.

[7] Several 8(a) (1) allegations are founded on the premise that Lucy O'Brien was aware of union activity well prior to December 18. If true, it is fair to infer that O'Brien would have shared this allegation with Gatlin. The first of said allegations emerges from an amendment to the complaint naming O'Brien as having coercively interrogated employees on or about December 1, 2 and 3. In support, a former employee, William Savilla testified that during the first week in December, O'Brien approached his work area, inquiring as to who was organizing the Union. According to Savilla, several days later, O'Brien asked him if he knew who had signed cards. Savilla also testified that O'Brien told him not to join the Union, because it was bad, it was a lie, it was like the Communists. Savilla, whose employment terminated when he declined to return after three successive suspensions for poor work, was an unreliable witness. He failed to suggest even the slightest involvement in union activity, and hence his testimony does not illustrate that he was a likely candidate for interrogation on this subject. Finally, important aspects of his testimony collided with that of other witnesses for the General Counsel, and his accounting reflected a perceptible inability to grasp and retell events as they occurred. His uncorroborated testimony has been discounted in its entirety. The 8(a)(1) allegation based thereon shall he dismissed.

[8] Lowry's testimony in connection with an 8(a)(1) interrogation issue, if believed, would also support early knowledge on Gatlin's part. Thus, Lowry avers that, on November 28, as she was punching in, Gatlin inquired ''what are you doing with the Union[?]'' Lowry allegedly replied, ''Nothing.'' Gatlin then allegedly asked, ''Did you bring the Union?'' Lowry replied in the negative. In addition to asserting that she knew nothing of union activity until December 18, Gatlin denied ever questioning an employee concerning union activity. While I did not believe all that Gatlin had to say, Lowry was a thoroughly unreliable witness, whose testimony was not believed unless confirmed by other believable sources. The 8(a)(1) allegation in this respect is unsubstantiated by credible evidence and it shall be dismissed.

[9] Several witnesses for the General Counsel testified that O'Brien was rarely seen at the courthouse before November 27, but thereafter was present regularly. O'Brien acknowledged that before December 1, she visited the courthouse only occasionally, but that subsequently she did so on a daily basis. When offered the opportunity to explain this change, she simply replied: ''I have my reasons.'' In the circumstances, it is fair to infer that those reasons related to the discovery of union activity by Gatlin on the previous Monday.

cleaners involved, including Lowry. In consequence, Lowry received a written citation, which provided for a 3-day suspension. (R. Exh. 4(f).) Lowry again refused to sign the document, accusing Gatlin of being unfair, while asserting that she was doing her job.[10]

It is thus apparent that before advent of the Union, Lowry had been targeted for discipline under conditions totally unrelated to statutory considerations.

As for the events triggering the discharge, Lucy O'Brien testified that on Lowry's return from suspension on Friday, November 24, she manifested a terrible attitude towards supervision, accusing them in face-to-face dialogue, of squeezing her and discriminating against her without recognizing that she is a good worker. Gatlin adds that during this same period she was receiving informal notification from tenants that Lowry's areas were not being dusted and vacuumed.[11] On December 1, O'Brien confirms that Gatlin reported this by telephone. The latter explained that she sought assistance from O'Brien, because Lowry had become ''very hostile'' and had threatened to get a lawyer. As O'Brien recalled, Gatlin stated in this conversation that she could no longer tolerate Lowry as she was not performing, while disobeying orders, making Gatlin look bad in front of other employees.[12] Because certain areas, including Lowry were in bad shape, with vacuuming and dusting presenting the main problems, Gatlin requested that O'Brien send additional help to clean the area, and that O'Brien come to the courthouse to verify Gatlin's complaints concerning Lowers work area.

On the evening of December 1, O'Brien, after detailing the on-call employees,[13] departed for the courthouse, arriving about a half-hour to an hour into the shift. With Gatlin, she first checked the public bathrooms on the third floor, which were not part of Lowry's responsibility, but had been cited in earlier adverse inspection report. (G.C. Exh. 7.) By then, the bathrooms had been corrected. They next went to Lowry's area, where heavy dust was found all over the furniture, with the carpets spotted and containing dust balls at the corners.[14]

A key discrepancy involved an unlocked closet between two adjoining courtrooms, which, according to O'Brien, had not been cleaned for days, and was cluttered with cigarettes, old clothes, paper, food, etc. With this discovery, O'Brien sent Gatlin to fetch Mary Wonson, Lowry's immediate supervisor. O'Brien, with corroboration from Gatlin, who had returned to the area, testified that she confronted Lowry about the closet, asking, ''Is this the kind of work you do?'' Lowry responded, ''This is not mine. It is not my area.'' Lowry shifted the blame to Wonson by stating that she had not been told to clean that closet. According to O'Brien, Wonson countered by ''blaming Rosa for not doing her job, not obeying orders, talking to others all the time, wasting time, not really doing her work, responding to her every time she assigned her to do something, or insubordinate to her.''[15] According to Gatlin, Wonson insisted that she had previously instructed Lowry that the closet was her area ''but that she was always talking with someone, and not paying attention to her assigned area.'' O'Brien related that, as this discussion ended, Lowry went out of control, calling her a ''stupid old lady,''[16] and then upbraided Gatlin, stating: ''You discriminate . . . [against Hispanics] because you are Black and you favored all the Blacks here.''

Lowry was then permitted to return to work. Gatlin and O'Brien repaired to the office and decided on discharge. Because of Lowry's charges of discrimination and threat to secure legal counsel, Gatlin requested that O'Brien back her up. For this reason, O'Brien took the unusual step of joining Gatlin in signing the discharge letter.[17]

Shortly after 10 p.m., Lowry was informed of the termination in the office by O'Brien. Gatlin and Cecilia Tovar, the Respondent's secretary, were also present when Lowry was given the termination letter.[18] The stated grounds for termi-

[10] Lowry admits to disobeying an order. However, she claims that her refusal was out of fear of an electrical shock when she was told to vacuum a wet carpet. Gatlin denied that she would have directed anyone to vacuum a rug that had just been shampooed. Although Lowry stated that she declined to sign the warning because ''not guilty,'' on cross-examination, Lowry added that she also received this discipline because she told Gatlin that because she was a boss she did not know ''what work the work of cleaning was.'' The latter is reminiscent of several characteristics willingly manifested by Lowry which tends to support management's accusations that she was an undesirable employee. The condescension toward her boss evident in this remark was matched by her claims that, well before advent of the Union, she was given too much work, a factor which is hardly inconsistent with the charge that she did her job poorly. Moreover, her inability, while on the witness stand to abide by simple instruction and her acute, defensive posture while testifying, are also in consonance with a traits criticized by Gatlin. In sum, Lowry made a fairly strong case against herself.

[11] Gatlin testified that, prior to November, informal complaints of this kind were recorded as part of a contest in which cleaners were broken down into teams. (R. Exh. 7.) She relates that in November the contest ended and there was no further need to utilize these forms. The forms themselves reflect that they were used as part of an effort to stimulate competition between groups and, beyond that, do not suggest that they were maintained as an operational routine. Weighed in the context of all the evidence bearing on Lowry's termination, I credit Gatlin, and in doing so, reject the General Counsel's arguments founded on the fact that no similar reports were generated after October 24, 1989.

[12] O'Brien in narrating the remarks of Gatlin mentioned that Gatlin referred to an inspection report showing that Lowry's area was in bad shape. As O'Brien confirmed on cross-examination, there was no inspection report pertaining to Lowry's work area during that week. O'Brien's confusion is explainable. There was an inspection that week, but it was not performed in Lowry's area. On arrival, she first inspected areas on the third floor that were covered by the resulting report. Furthermore, she testified that the discharge resulted from her personal inspection which confirmed the unofficial complaints that had been received by Gatlin; she at no time testified that Lowry was terminated because of an adverse inspection report.

[13] O'Brien identified Zoila Cribeiro, Maria Ramos, and Maria Cintana as ''on-call.'' employees used on a supplementary basis to correct deficiencies on December 1.

[14] Lowry testified that prior to December 1, only Mary Wonson had inspected her work. Her prehearing affidavit states that Gatlin, as well as Wonson, did so. As will he recalled, O'Brien, earlier, had inspected her area following the adverse inspection report of August. 31. In any event, Lowry would not necessarily be aware of inspections by O'Brien conducted outside her presence.

[15] Wonson was also given a warning because of the discrepancies in Lowry's area. (R. Exh. 5.) She did not appear as a witness.

[16] Lowry spoke in Spanish and Gatlin indicates that she could not understand what she was saying, but did observe that Lowry spoke ''in a very loud upsetting tone.''

[17] The parties stipulated that this was the only disciplinary notice in the Respondent's files which bore O'Brien's signature. Gatlin acknowledged that O'Brien's involvement to this extent was not normal procedure, but, Gatlin explained that, at the same time, she was ''not normally threatened of suing.''

[18] R. Exh. 4(g). The General Counsel argues that Tovar's presence had sinister connotations. She was there, according to Gatlin, to inspect payroll and records. The General Counsel challenges this explanation because the pay period would not end until the close of the shift that evening, and hence the timecards remained inchoate. However, Tovar was not squarely confronted with the evidence suggesting that she might not have been present for that reason on that occasion, and she was not, in that context, given fair opportunity to explain her attendance. The abstract questions put to her by the General Counsel were elliptical and likely to produce an unknowing response. In any

Continued

nation were refusal to obey orders and failure to perform work satisfactorily. Lowry testified that no one read the document, and being illiterate she did not know what it said. All three insisted that she sign.[19] Ultimately, Lowry was given the letter by Gatlin and told she had been fired ''because I didn't do my work correctly.'' Lowry then told Gatlin that she was being terminated for no reason, going on to tell Gatlin, ''Now, you eat the hot oil . . . later, you can eat the boiling oil.''[20] Lowry testified that she told O'Brien that Gatlin was firing her because she observed Gatlin kissing a building engineer.

The General Counsel asserts that the incident leading to the discharge ''appears to have been prearranged.'' While I have strong reservations, particularly in the case of O'Brien, as to the trustworthiness of the Respondent's witnesses, my hesitancy in crediting them is overridden by Lowry herself. Lowry was an impossible witness whose demeanor was sufficiently adverse to undermine any theory advanced in support of her cause. Apart from the content of her testimony, itself unacceptable, Lowry's demeanor reflected defensive posturing so intense as to confirm the same abiding discomfort with reality as she demonstrated in connection with past discipline, none of which is subject to challenge as proscribed under the Act.

Indeed, this penchant for excuses and deflection again emerged in Lowry's account of the events of December 1. The accusation concerning a table of dust was countered not by assertion that the incident didn't happen. Instead, Lowry spun a wild tale that the table had been cleaned, but then soiled by O'Brien who reached in a bag, doused her fingers with something that looked like cigar ash, and then rubbed her already soiled fingers over the table. She countered the accusation concerning the uncleaned closet by denial that this was part of her area of responsibility.[21] In addition, she claims that both Wonson and O'Brien instructed her to clean overhead lights by climbing on a chair or a table, or as she imputes to O'Brien, ''Kid, you can put the chair on top of the table.''[22] Lowry goes so far as to state that O'Brien then told her that she was ''too short to work for her company.'' Finally, when O'Brien and Gatlin assertedly told Lowry to quickly vacuum the room, Lowry complained that the vacuum cleaner was defective. According to Lowry, when Lowry finished, O'Brien became upset, pulling the plug so hard it bruised Lowry's fingers. As the capstone, Lowry accuses Gatlin of terminating her because she was aware that Gatlin was romancing a building engineer.

One can never consider as free from doubt, a defense postulated through witnesses whose testimony in other material areas is deemed incredible. Here, however, the testimony of Gatlin and O'Brien is confirmed by a back-ground of discipline having nothing to do with unionization, made more believable by Lowry's performance on the witness stand. Lowry's excuses that she had ''too much to do'' and ''that they gave [her] too much work'' imply a personal awareness that she was not performing, either quantitatively or qualitatively, to management's expectations. Beyond that, on scrutiny of Lowry's testimony concerning the events of December 1, factors emerge that suggest that her performance that evening was just more of the same, and not terribly different from that which had led to prior citations, including the recent 3-day suspension.[23] In sum, Lowry's own failings as a witness cause me to swallow hard and accept, in her case, the testimony of O'Brien and Gatlin, and based thereon to conclude that she would have been discharged on December 1 even had she not engaged in union activity. Accordingly, the 8(a)(3) and (1) allegation contesting her discharge shall he dismissed.

2. Hector Martinez

a. *Preliminary statement*

In contrast with Lowry, Hector Martinez was the most impressive witness to testify in this proceeding. His employment with the Respondent ended on December 18, after the meeting called by the Company to explain its position regarding unionization. As already stated, the General Counsel contends that he was discharged in the course of a heated exchange with Lucy O'Brien, in which each acused the other of lying. On the other hand, the Respondent insists that he voluntarily quit.

b. *The facts and testimony*

Martinez was hired on August 5, 1988, and worked continuously as a cleaner until his termination. During his tenure, he had not a single disciplinary problem. He was supervised by Maria Vasquez, who in turn reported to Gatlin. As shall be seen, when Vasquez signified her intention to quit, Martinez was the first selected by Gatlin to replace her, with O'Brien herself making the offer.

Martinez testified credibly that he was personally responsible for the union drive, having made the initial union con-

event, the absence of a specific, valid reason for her appearance at the terminal interview warrants no assumption that she was there in furtherance of an unlawful scheme.

[19] Lowry testified that O'Brien threatened to put her in jail if she refused. Lowry's affidavit states that it was she who told the others to call the police while telling them to put her in jail. Gatlin denied that there was any reference to the subject of police or arrest in the course of the termination interview.

[20] Lowry describes this as an inoffensive Honduran expression.

[21] If not hers, there was no attempt to demonstrate just who was responsible for that area.

[22] Lowry testified that Wonson's instruction related to a single room, while her affidavit states that Wonson told her to clean the overhead lights on the entire floor and she refused to do it because it was not her work. In another contradiction, Lowry testified that O'Brien first asked her if she had cleaned the lights in room 3120, but then changed her testimony to reflect that O'Brien instructed her to do so. The General Counsel conceded to the accuracy of testimony by O'Brien and Gatlin that cleaning at levels more than 72 inches above the ground was performed three times annually, by a fixed, all male crew. Gatlin credibly testified that she never instructed Lowry, or any other female employees to clean lights above the 72-inch level. Gatlin also points out that, during her presence, the subject of high cleaning was not mentioned during the December confrontation in Lowry's work area.

[23] My disbelief of Lowry runs sufficiently deep to impel rejection of the entirety of her testimony, whether or not contradicted, unless confirmed by other independent believed sources. Hence, it is unnecessary to comment on every angle of the plot woven by this thoroughly unreliable witness. It is noted, however, that, without benefit of Lowry's testimony, the General Counsel's attempt to refute the assigned causation is diffused materially. One surviving consideration is the suspicion generated by the assignment of Zoila Cribeiro to assist Lowry on the evening of her discharge. Cribeiro is O'Brien's sister-in-law. As a part-time employee, she is paid about $450 per week, well above the scale earned by regular housekeepers. Cribeiro admittedly did not punch in on December 1. That the Respondent would select one with special status to assist the very person who would be discharged at shift's close and who recently had been seen with union representatives, offers an intriguing coincidence. However, in the face of my belief that Lowry's ineffectiveness as an employee was again manifested that evening, far more would he required to support the inference sought by the General Counsel in her case.

tact on November 18, advising union officials that coworkers wished representation. He was present outside the courthouse on Monday, November 27, when union representatives had the opportunity to meet with Respondent's employees. Martinez admits that he did not sign a union card at that time, but urged and assisted others to do so. It has been heretofore found that Gatlin was in a position to observe his presence during her brief encounter with Union Representative Hessey on that occasion.[24]

Although, as shall be seen, the knowledge defense is not as compelling as in Lowry's case, certain independent 8(a)(1) allegations, while relevant to that issue, are more significant because of the light they throw on just what transpired between Martinez and O'Brien on December 18. In that connection, the parties admit that before that date, Martinez and O'Brien had two conversations. However, O'Brien denies that the Union was mentioned in either.

As for the first, the General Counsel contends that on December 7, Lucy O'Brien telephoned Martinez and in the course of their discussion, interrogated him concerning union activity, while creating the impression that the activity was subject to surveillance. Prior to December 7, Martinez had requested time off during the impending Christmas holidays. He testified that during their conversation of that date, O'Brien denied that request, then asked, ''What is knew [sic] in the courthouse?'' Martinez claims to have replied that he could add nothing to what she already knew. According to Martinez, she then stated ''that she knows some people who had been standing in front of the courthouse, and that these people were members of the union.''[25] She went on to state, that since Martinez was a good worker, she wanted to ask how many signed union cards. Martinez denied knowledge. In contrast with his account, O'Brien denied that the Union was even mentioned at that time.[26]

The second conversation took place on December 14. The General Counsel contends that, during the course thereof, O'Brien violated Section 8(a)(1) by offering financial benefits and a higher position to Martinez in exchange for his abandonment of the Union. Although the testimony is in conflict, under either version, this exchange covered the topic which triggered the employment-ending argument that erupted on December 18 between O'Brien and Martinez.

By way of background, it is noted that, prior to December 14, Maria Vasquez, an assistant supervisor, had signified her intention to quit. Martinez was the first to be offered promotion as her replacement. Thus, he testified that O'Brien, in company with Respondent's secretary, Cecilia Tovar, confronted him in his work area, declaring that she had come to make him an offer. She allegedly stated that she wished to make him a supervisor, enabling him to earn up to $36,000 annually. She added that she could provide help if Martinez wished to buy a house or car. She then expressed that this was subject to a single condition, i.e., he should not sign a union card. Tovar commented that the offer was a good one. O'Brien said that she needed an answer that evening. Martinez said he had to think it over, but never did respond.

O'Brien offered the following version:

> You have been recommended by your superiors that you would be a good candidate to perform this work, to be trained and learn how to do it, and one of the fact is that you speak both languages, and you can help us a lot if you really learn how to do the work, and of course you will make more money, and you will be in a better position with the company.

O'Brien denied mentioning $36,000, and that she was aware at the time of union activity or that Martinez favored the Union, hence, by implication denying that the offer was made contingent on union activity.[27]

On December 18, at about 5:40 p.m., a group consisting of Hessey and Ramiro Salinis, another union representative, and about 15 to 20 employees assembled on a the basement level. Ten minutes later, most of this group departed for Gatlin's office, with about 10 to 20, including Martinez, actually entering.[28] Hessey presented Gatlin with a formal demand for recognition, explaining that a majority of employees had signed authorization cards indicating their preference for union representation. According to Gatlin, as he enterred, she was on the telephone with O'Brien. She described his manner as demanding, authoritative, and unfriendly. Hessey

[24] Martinez testified that during the interim between November 27 and December 18, he engaged in handbilling outside the courthouse and, on about six occasions, solicited coworkers to sign union cards.

[25] This testimony fails to substantiate that the Respondent violated Sec. 8(a)(1) by creating the impression of surveillance. In *California Dental Care*, 272 NLRB 1153, 1165 (1984), a case cited by the General Counsel, Judge Jerrold H. Shapiro stated: ''In determining whether an employer created the impression of surveillance the test applied by the Board is whether, under the circumstances, the employee would reasonably assume from the statement in question that the employee's union activities had been placed under surveillance.'' Here, Martinez held a firm opinion as to the source of O'Brien's information. Thus, his own testimony reveals that he informed O'Brien that she already was aware of what was going on, a reference reflecting his surmise that O'Brien was privy to information discovered by Gatlin's November 27 encounter outside the front entrance of the courthouse. The General Counsel does not quarrel with the fact that Gatlin's appearance on that occasion was perfectly innocent. Thus, her presence, quite properly, was not contested as proscribed surveillance. Indeed, the Board has recognized that ''it does not constitute unlawful surveillance or creation of that impression for an employer to observe that which is plain to see while he is about his usual business or activities and without his having deliberately and obtrusively placed himself to spy over his employees' union activities.'' *Well-Bred Loaf*, 280 NLRB 306, 310 (1986). See also *Key Food Stores*, 286 NLRB 1056 (1982). Gatlin's exiting through the entrance customarily used to leave work, made contact with the union gathering immediately outside inevitable, yet accidental. Therefore, the confrontation was plainly coincidental. The 8(a)(1) allegation premised on the assumption that Martinez was led to believe that union activity was being monitored is unsubstantiated and shall be dismissed.

[26] The Respondent in its posthearing brief argues that O'Brien's credibility with respect to this conversation is somehow enhanced because the General Counsel failed to cross-examine Gatlin with respect to this conversation. There is no merit in this observation. There is no evidence that Gatlin was in a position to either hear what O'Brien was saying on the other end of the telephone or to comprehend her remarks which apparently were in Spanish. Gatlin, on direct, was not examined as to the content of this conversation, and, hence, cross-examination on this subject would have been plainly inappropriate.

[27] In testifying and in her prehearing affidavit, Tovar denies that she was present. when O'Brien offered Martinez a supervisory position. Obviously, Martinez would have had no reason to place an adverse witness on the scene of this important conversation unless he were certain that Tovar was present. Here again, the Respondent. argues that the testimony of O'Brien concerning this incident was somehow enhanced by the failure of the General Counsel to cross examine Tovar concerning this incident. In this regard, I first note that the only appropriate area for cross-examination of Tovar was her presence, and not the content of the conversation between O'Brien and Martinez. More importantly, I reject, as irrational and unlikely to lead to truth, any notion that an attorney's failure to question an adverse witness taints primary evidence he or she has adduced or intends to produce on the particular subject matter.

[28] Gatlin could not recall that Martinez was along that group. She could identify any the other 10 employees inside the office on that occasion.

spoke to O'Brien, who accused him of interfering with employees' reporting for work. Hessey denied this, pointing out that it was only 5:55 p.m. Before leaving, Hessey warned Gatlin that the Employer had an obligation to honor the rights held by employees under the National Labor Relations Act.

At 7:30 p.m., employees, having been pulled off their work, were called to meet with company officials in the basement locker room. On behalf of management, those present included Enrique Balseiro, the Company's attorney; Jose Sampedro, the Respondent's president, and Lucy and Michael O'Brien. Balseiro spoke first, addressing certain issues raised by unionization, and explaining that the contract at the courthouse would expire in May, and that renewal thereof would raise wage rates to $6.01 per hour. He also mentioned that the issue of union representation could be resolved by a secret ballot election under auspices of the National Labor Relations Board. Balseiro ended his talk, expressing that the Respondent did not oppose the Union, but the employees should think it over because the Union would not always keep its promises. Lucy O'Brien then spoke, making the same points as Balseiro. She then ended the meeting, and most of the employees began returning to work.

It was during this transition that the critical dispute erupted between Lucy O'Brien and Martinez. He testified, with corroboration from former employees, William Savilla and Consuelo Alvarez, that O'Brien, at this juncture, stated loudly and nervously that she wished to thank Martinez for assuring her that a majority of employees had signed cards.[29] Martinez interjected, ''that is a lie,'' explaining that he had not told her how many had signed. O'Brien then stated that the meeting was over. However, Martinez then stated that he wished to announce to all his coworkers that O'Brien offered him $36,000, if he declined to sign a union card. She became enraged, calling Martinez a liar, while stating, ''For what you have just said you are now fired.'' Savilla and Alvarez also testified that O'Brien stated that Martinez had been fired. The confrontation ended when Michael O'Brien entered the locker room and removed Mrs. O'Brien, escorting her to the office.

By way of defense, Lucy O'Brien insisted that Hector Martinez quit and also asserts that as of December 18, she was unaware that he was prounion. Gatlin testified that, to her knowledge, Martinez, before his employment ended never revealed his union sentiment and it was unknown. She avers that prior to the meeting in question, but on that very day, Martinez thanked her for offering the supervisor position, but declined on the ground that too much responsibility was involved.

Concerning the subsequent argument, O'Brien testified that after she ended the Company's meeting, approximately 14 employees remained in the locker room. As O'Brien was talking to Vasquez, Martinez passed by, and O'Brien took the opportunity to thank him for responding to the promotion offer, as he had done earlier. It is the sense of her testimony that this innocent remark sparked an emotional explosion on Martinez' part. Thus, he allegedly shouted at O'Brien, ''Don't talk to me,'' while calling her a ''big so-and-so liar.'' He accused her of buying him out, offering $36,000. Lucy O'Brien thought he was ''crazy'' as the accusations were untrue and she did not know what Martinez was talking about. His rage next carried him to scream, ''I am quitting, and I can't take this.'' Her husband, as Martinez pounded on the table, screaming, escorted her from the room and they went to the office. She denied that she fired Martinez.

Jose Sampedro, the Respondent's president, was the sole witness called by the Respondent who claims to have been in a position to corroborate Lucy O'Brien's testimony as to what took place in the locker room.[30] He testified that he was outside in the corridor, talking to Michael O'Brien when he heard someone shout aloud, ''You are a liar. I am quitting.'' When he looked inside, he saw Martinez nearing O'Brien, saying, ''No, man you're a liar.''[31] O'Brien then countered, ''No, the one who is lying is you.'' Martinez allegedly moved more closely to her, raising his hands, and calling her a ''witch'' liar.[32]

The dispute concerning the locker room exchange is shadowed by the Respondent's testimony that Martinez again declared that he was quitting after changing clothes and attempting to leave the premises. In this respect, Martinez described his action as limited to changing clothes, and then delivering his uniform to Gatlin. He then went to the office to punch out, but was not allowed to enter, being instructed by Michael O'Brien to just leave. In contrast, O'Brien testified that, at the time, Martinez knocked on the door, and was allowed in the office. She claims that, when Martinez attempted to punch his card, she stated it was unnecessary.[33] With corroboration from Cecilia Tovar, O'Brien related that Martinez then gave Gatlin his uniform and some equipment, stating, ''I am quitting.'' Gatlin, however, offered a somewhat different account:

> Q. Do you recall anything else of significance that happened that night?
>
> A. Yes. While the three of us was in the office, [Lucy O'Brien, Cecilia Tovar, and Gatlin] someone knocked at the door, and I opened the door and it was Hector. He gave me his uniform, and he was going to punch his card, but Lucy told him that it was not necessary for him to punch his car.
>
> Q. Is that. all you remember?

[29] Savilla testified that O'Brien stated, ''I want to thank Hector for having informed that the union is going to come.'' Alvarez' version was slightly different. She testified that O'Brien thanked Martinez because ''he had informed her that . . . [employees] wanted a union.'' While I do not regard these variations as terribly consequential, the ultimate credibility resolution is made not because of corroboration, but on the strength of my belief of Martinez, who struck me as the only witness presented that did not betray the oath in critical areas.

[30] Michael O'Brien, who sat through the entire hearing was not called. Gatlin, who could not understand what was said, because the argument was waged in Spanish, also could not hear it as she was in the office. Tovar also claimed that she remained in the office.

[31] In its posthearing brief, counsel for the General Counsel moves to correct Sampedro's testimony, by substituting ''ma'am'' for the term ''man'' as it appears in this transcript quote. The request is denied. Neither my notes, nor recollection confirm that the official record is inaccurate. Moreover, it is not inherently in error, for the term ''man'' in argumentative street vernacular is often used without regard for the gender of the person addressed.

[32] Sampedro first testified that Martinez used the expletive ''bitch liar,'' but when questioned as to the Spanish term actually used, he conceded that it was ''bruja'' meaning ''witch'' not bitch. Moreover, although he claims that he directed Michael O'Brien to remove his wife because he was afraid for her safety, a few minutes later, Martinez passed him in the corridor, headed for the office, yet Sampedro did nothing to stop him.

[33] The bypass of the timeclock seems more in keeping with a discharge than a voluntary quit.

A. And when he gave me his uniform, and I had already asked him was he going back to work, and he said he was leaving, and when anyone give me their uniform, they are quitting.

Q. Did you actually hear him say in English, ''I quit.''

A. No.

Thus, Gatlin, rather than testify that Martinez said he was quitting, preferred a tortured construction of his actions which she first swore was indicative of a quit. She later would admit that Martinez would have acted no differently if discharged.

c. *Conclusions*

As heretofore stated Martinez impressed as the most reliable witness in this proceeding. Gatlin's testimony that she did not encounter union representative Hessey on November 27 or learn at that time that organization efforts were underway has been rejected.[34] Instead, it is concluded that the information she acquired at that time, obviously, would have been relayed to O'Brien. This inference is bolstered by my belief of Martinez' testimony that O'Brien in their December 7 telephone conversation referred to the November 27 courthouse incident, albeit obliquely, and interrogated him at that time as to who had signed authorization cards, conduct which in the circumstances, was coercive, and violative of Section 8(a)(1).[35]

O'Brien's version of the December 18 confrontation makes little sense. She describes Martinez as first having expressed gratitude for the offer of promotion, while rationally affording a reason for declining, but then, with no provocation whatever, and without reference to the Union or to any statements made by O'Brien, branding her a liar, while unleashing a verbal assault, including actions which she deemed physically threatening. Her version facially offers no clue as to what might have inspired Martinez to such vicious behavior toward his employer on the heels of nothing more than a temperate expression of management's views on the Union, and as she simply offered a gracious ''thank you'' for responding to the promotion offer. Her testimony fails to offer any rational explanation for his calling her a ''liar,''[36] or the manifestation of temperament which, from my impression of Martinez, seemed totally out of character. On the other hand, O'Brien struck as emotionally volatile, and not for a moment would I harbor the thought that an opportunity to quit might survive the open challenge in front of others that she attributes to Martinez.

Unlike the questions raised by O'Brien's testimony, Martinez' version ties together logically. It is only natural that Martinez would have reacted with angry denial when O'Brien, in effect, suggested, in front of coworkers, that he had served as a ''pipe line'' used by management to accumulate information concerning union activity.[37] It is perfectly plausible that Martinez would strike back to restore his credibility in the eyes of his peers by first calling O'Brien a liar, and then exposing that O'Brien on December 14 had sought to induce him to turn his back on the Union in exchange for promotion, opportunity for enhanced earnings, and help if he sought to purchase a home or car.[38] He was believed over

[34] The testimony of Gatlin and O'Brien was hardly enhanced by their mutually corroborative attempt to demean Martinez' competence as an employee. Initially O'Brien offered faint praise, rating him as just ''fair.'' She later indicated that the Company's practice is to promote from within based on supervisory recommendation of responsible employees. She admits that Martinez, out of 55 to 60 employees, was the first of only three employees offered the supervisory position that Maria Vasquez would soon vacate. Ultimately, O'Brien admitted that in her opinion Martinez was a good employee. Gatlin danced this same ''tight-rope,'' describing Martinez as just an ''average'' employee who did what he is told, ''but does not ask for extra work whenever he is finished with his job.'' Gatlin could name only three employees who she considered above average, not one was a full-time employee. Finally, Gatlin admitted that in this industry it is difficult to find people that do as they are told, and agreed that those that do are ''above average.''

[35] While it might be said that an employer has a ''legitimate interest'' in finding out whether its employees have been contacted by a union, caution must be exercised where employees are tapped for such information. In those circumstances, any ''tendency'' to restrain and coerce will substantiate illegal activity. In this instance, the inquiry was made by a high ranking management official, whose stature in the Company would be elevated it the eyes of employees by her infrequent visits to the jobsite. In questioning Martinez, O'Brien transcended any quest for generalized information by seeking to reduce him to an informant on the protected activities of others. As the Union had made no claims on the Respondent, Martinez would rightfully labor under the apprehension that management wished to identify union adherents in order to carry forth a plan of reprisal. In my opinion, such an inquiry, prior to any demand for recognition, by one who carried the weight of Mrs. O'Brien was enshrouded with pressure and unlawful under the standards established in *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[36] O'Brien was given the opportunity to surmise concerning Martinez' motivation. Her response produced another inconsistency between the Respondent's witnesses and in any event failed to lend plausibility to her account. Thus, she suggests that Martinez might have been angered by the fact that her remark made others aware that he had been offered a job with management. Consistent therewith, it was her hypothesis that she was accused of lying as an attempt by Martinez to deflect attention away from the fact that he had been offered the supervisory post. However, she concedes that this offer was no secret. Moreover, any sensitivity on Martinez' part is betrayed by O'Brien's testimony that it was he who drew attention to her offer by accusing her of an attempt at ''buying him out.'' It is in this same area that Sampedro's credulity was seriously compromised. Despite O'Brien's struggle on the witness stand for an explanation as to what might have provoked Martinez, Sampedro testified that she had previously discussed this subject with him. However, he claims that on that occasion O'Brien had articulated an entirely different theory. Thus, Sampedro related that she had told him that Martinez made this accusation because she denied having offered him $36,000 in salary with assistance if he wished to buy a car and a house. It was my distinct impression that O'Brien, on being examined in this regard, was taken by surprise, and had not given thought to the motivation issue that arises from her story. Sampedro's testimony impressed as a false attempt to bootstrap a fundamental flaw in O'Brien's account. Unfortunately, it is difficult to reconcile with her explanation, hence, creating another flaw. He, too, basically was an untrustworthy witness.

[37] I note with interest a key omission in the Respondent's posthearing brief. At p. 7, the Respondent.'s counsel chronicles the December 18 confrontation between Martinez and O'Brien. Despite the latter's testimony that Martinez opened the incident by calling her a ''liar'' and reiterated this term as the argument escalated, it goes unmentioned in briefing the incident, with counsel settling for less offensive remarks attributed to Martinez. Ordinarily, to scold one's boss publicly as a liar is an act of sufficient scurrility to evoke exhaustive discussion by management counsel. Neglect of this prominent aspect of the case against Martinez is not lightly dismissed as an innocent act of oversight.

[38] Although the Respondent asserts that it is preposterous that Martinez could earn $36,000 annually, exaggeration is not alien to the ordinary process of inducement whether the context be a sale, offer of marriage, or abandonment of a union. Thus, contrary to the Respondent, this allegation does not turn on whether the Respondent could deliver, but whether O'Brien resorted to this form of puffery in the effort to lure Martinez away from the Union. In this respect, O'Brien concedes that Martinez referred to the $36,000 figure and offers of assistance in purchasing a home and automobile during the December 18 confrontation. Her admission to having made the offer of home buying assistance on December 14 demonstrates that, for some undisclosed reason, O'Brien was willing to go beyond benefits inherent in the supervisory position to simulate Martinez' interest As for the $36,000, this figure was either distorted, misunderstood, or a consequence of miscommunication. How-

Continued

all of the Respondent's witnesses to the incident.[39] Moreover, as his discharge was actuated by dispute which centered on union activity, while triggered by O'Brien's accusation that Martinez was a management source as to such matters, the latter's entire involvement was protected by the Act,[40] and his discharge in consequence, violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local No. 525, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating an employee concerning union activity and by offering promotion and other financial inducements to influence an employee to refuse to support the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by, on December 18, 1989, discharging Hector Martinez because of his union activity.

5. Except as defined in paragraphs 3 and 4 above, the Respondent did not engage in any of the unfair labor practices set forth in the complaint.

6. The unfair labor practices found above have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

In the case of Martinez, the Respondent opposes any remedy on grounds that after the discharge, beginning on December 18, and extending into January 1990, Martinez engaged in a pattern of misconduct towards Lucy O'Brien which disqualified him from future employment. In this respect, O'Brien testified, with support from Sampedro, that during the December 18 outburst, Martinez approached her in menacing fashion, placing her in fear. He allegedly moved towards her, shouting, while raising his hands. I have already discredited her basic account of her confrontation with Martinez, while deeming Sampedro's attempt at corroboration equally unreliable.[41] Furthermore, the conduct she describes, according to her own testimony, would have occurred as her husband, a much larger man than Martinez, stood in the doorway. To this same end, O'Brien also cites postdischarge incidents, all occurring at the courthouse. O'Brien claims that the first occurred just before Christmas, at about 6:30 p.m. She claims that when Martinez observed her, he grew nervous and very ''abnormal,'' making a fist and admonishing her that she would pay for this. On another occasion, she avers that Martinez inspired another individual to photograph her at close quarters, while referring to O'Brien as a son-of-a-bitch, with the picture shot at a point so near that O'Brien claims to have been blinded by the flash. She further avers that Martinez addressed another employee, Gudella Quiteres, calling her a Mexican son-of-a-bitch, while stating she would pay for this, ''If you are not aligned to us, you are going to be in trouble.'' I credit Martinez' denials and find that all were created by O'Brien in a contrived attempt to block reinstatement of this prounion employee.

Thus, it having been found that the Respondent T & C discharged Hector Martinez in violation of Section 8(a)(3) and (1) of the Act, it shall be recommended that the Respondent be ordered to reinstate his to his prior position and lake him whole for earnings lost by reason of the discrimination against him. Backpay due under the terms of this order shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed as specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, C.P.F. Corporation, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning union activity.

(b) Promising benefits to employees to influence them against supporting a union.

(c) Discouraging union membership by discharging, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Hector Martinez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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ever, it is not necessary to decide just what occurred, for none of the possibilities shake my confidence in Martinez and my belief that he would not have mentioned it on December 18, absent a sincere belief that it had been offered. More importantly, based on his testimony, I find that the offer extended by Lucy O'Brien on December 14 was made on the express condition that Martinez not sign a union card. Accordingly, the Respondent thereby violated Section 8(a)(1) of the Act.

[39] In crediting Martinez, it is concluded that, having been discharged by O'Brien earlier, consistent with Gatlin's eventual testimony, there was no reason, and he did not, in turning in his uniform, announce that he was quitting.

[40] As shall be seen, infra, the conduct of Martinez on December 18 would not impair the appropriateness of the conventional reinstatement and backpay remedy. I would further note that considering the provocation on O'Brien's part and the protected nature of Martinez' actions, any disrespect manifested on his part would not, in the circumstances, remove the protective mantle of the Act. See, e.g., *Thor Power*, 148 NLRB 1379 (1969), enfd. 351 F.2d 584, 587 (7th Cir. 1965); *Model A & Model Motor Car Corp.*, 259 NLRB 555 fn. 4 (1981).

[41] As correctly observed by the General Counsel, Sampedro's own testimony is to the effect that, shortly after this confrontation, he allowed Martinez to pass him in the corridor, en route to the office where O'Brien, in company of two other women, was located.

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files, delete, and expunge any and all reference to the unlawful discharge of Hector Martinez, notifying him that the action has been taken, and that the termination will not be used against him in the future.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices and facilities in Washington, D.C., copies of the attached notice marked ''Appendix.''[43] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall, be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall he taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''